80-950

Supreme Court, U.S.
FILED
NOV 12 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

GEORGE C. NICOLADZE, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JERROLD M. LADAR
Suite 310
507 Polk Street
San Francisco, CA 94102
Telephone: (415) 928-2333

Attorney for Petitioner

QUESTIONS PRESENTED

I.

WHETHER PETITIONER'S FIFTH AMENDMENT DUE PROCESS RIGHT TO AN ANBIASED GRAND JURY WAS VIOLATED BY THE STATEMENT OF THE PROSECUTOR TO THE GRAND JURY THAT THE CASE WOULD NOT BE PRESENTED TO THEM UNLESS THE I.R.S. AND THE JUSTICE DEPARTMENT WERE SATISFIED THAT, BEYOND A REASONABLE DOUBT, "THE INDIVIDUAL IS GUILTY".

II.

WHETHER PETITIONER'S SIXTH AMENDMENT RIGHT TO JURY TRIAL WAS IMPROPERLY IMPINGED UPON BY ADMISSION INTO EVIDENCE OF CERTAIN CHARTS, RESULTING IN A "TRIAL BY CHARTS".

III.

WHETHER PETITIONER'S RIGHT TO A FAIR TRIAL WAS VIOLATED BY THE ASKING OF IMPROPER IMPEACHMENT QUESTIONS TO CHARACTER WITNESSES.

INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statement	3
Reasons for Granting the Writ . . .	7
Conclusion	17

Appendices

Memorandum, United States v. George C. Nicoladze, of Court of Appeals for the Ninth Circuit, affirming judgment of conviction . . . . . Appendix A

Page

Cases

United States v. Lewis,
482 F.2d 632, 639 (D.C. Cir. 1973) 16

United States v. Rintelen
235 F. 787 (1916) 12, 13

United States v. Samango,
607 F.2d 871 (9th Cir. 1979) 10, 11

Wood v. Georgia,
370 U.S. 375, 390 (1962) 8, 11

Codes

Devitt and Blackmar, Federal Jury
Practice and Instructions,
§ 33.03 (3d ed.) 15

Federal Rules of Evidence, § 405 6

United States Code

Title 18, § 3651 3

Title 26, § 2701 3

Title 28, § 1254(1) 2

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

GEORGE C. NICOLADZE, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner GEORGE C. NICOLADZE petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the Court of Appeals (Appendix A, infra) is not reported and is not intended for publication. (Ninth Circuit Rules 21 (a) and (d).) The opinion was filed on October 22, 1980.

JURISDICTION

The opinion of the Court of Appeals

was entered on October 22, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I.

WHETHER PETITIONER'S FIFTH AMENDMENT DUE PROCESS RIGHT TO AN UNBIASED GRAND JURY WAS VIOLATED BY THE STATEMENT OF THE PROSECUTOR TO THE GRAND JURY THAT THE CASE WOULD NOT BE PRESENTED TO THEM UNLESS THE I.R.S. AND THE JUSTICE DEPARTMENT WERE SATISFIED THAT, BEYOND A REASONABLE DOUBT, "THE INDIVIDUAL IS GUILTY."

II.

WHETHER PETITIONER'S SIXTH AMENDMENT RIGHT TO JURY TRIAL WAS IMPROPERLY IMPINGED UPON BY ADMISSION INTO EVIDENCE OF CERTAIN CHARTS, RESULTING IN A "TRIAL BY CHARTS".

III.

WHETHER PETITIONER'S RIGHT TO A FAIR TRIAL WAS VIOLATED BY THE ASKING OF IMPROPER IMPEACHMENT QUESTIONS TO CHARACTER WITNESSES.

STATEMENT

After a jury trial in the United States District Court for the Northern District of California at San Francisco (the Honorable Robert F. Peckham, Chief United States District Judge), Petitioner was convicted of three counts of income tax evasion (26 U.S.C. § 2701).

On October 9, 1979 he was sentenced under 18 U.S.C. § 3651 to a "split sentence" -- six months in custody and thirty months suspended.

At the time the case was presented to the Federal Grand Jury, the following occurred:

> "During this investigation, Mr. Nicoladze made representations that certain monies that he had received from his clients were not taxable to him because they were contingent or conditional upon other things happening. He said certain clients would give him a fee and he would have to hold that fee, and it would not be income until he finished the services that he had rendered.
>
> "In questioning these various clients, no client supported that story. They all stated that the fees they paid to Nicoladze were fees for current services rendered and there was no agreement or understanding that any of the fees would be returned."
>
> . . . .
>
> A GRAND JUROR: Does it usually take this long, six years, to process

this type of tax evasion, or whatever it is? Is six years a normal time, or do you do it faster?

THE WITNESS [SPECIAL AGENT VENOR]: Investigations are very lengthy, and the review process, which these cases go to, takes a great deal of time. Cases are reviewed both locally and in the Department of Justice in Washington. It takes some period of time for them to return to the U.S. Attorney's office.

MS. SIMPSON [THE PROSECUTOR]: This case we received last month. The tax cases do follow a different route from most cases, as Mr. Venor pointed out.

After the Internal Revenue Service investigates a case, the Agent up through the District Director, decides to prosecute. It doesn't come directly to the U.S. Attorney's office, but rather to the Council for the IRS, and then they review the case to see if it meets the standards for prosecution. In other words, whether there's evidence or proof beyond a reasonable doubt, that the individual is guilty.

If the Local Council agrees that those standards are met, it's then forwarded to the Tax Division of the Department of Justice where attorneys for the Department of Justice again review the case for a determination to see whether those standards are, in fact, met.

Then it's forwarded to us. This case, we received last month with directions to present it to you.

(Tr., p. 10, 17-18, Grand Jury, April 11, 1979. Made part of record on appeal by Order, dated June 3, 1980.)

The grand jury indicted Petitioner the same day.

During presentation of its expert witnesses' testimony to the jury, the government had marked and presented to the jury certain schedules (Government Exhibits 64, 65, 66, 67). The jury was handed the exhibits, looked at them and testimony was adduced about them. Headings such as "Diverted Corporate Income", "Corrected Tax Liability", and "Unreported Income" were used on the exhibits. Defendant's counsel brought to the court's attention United States v. Abbas, 504 F.2d 123 (9th Cir. 1974), and the exhibits were stricken (RT 1546, 1552). The impact of summaries and charts upon the jury and the teaching of Abbas caused the trial court considerable concern:

> "Mr. Lyons: In making the comment with respect to the government, are you referring at all to --
>
> "The Court: I am referring to your failure to know about the Ninth Circuit case with respect to those surveys. I have explained that to you. How the tax division of the United States Attorney's office and the Internal Revenue Legal Division could bring a case without knowledge of that important decision

that affects the method of proof is something that I am afraid I cannot comprehend.

"There was not only a failure to conduct the necessary research, there also was the lack of support for you.

"I mean, that's the kind of a thing that someone in the Internal Revenue Service or in the Department of Justice in the tax division should pick up and alert these offices. To spend thousands and thousands of dollars on a prosecution and then perhaps commit prejudicial error simply because the case was not known is what I'm talking about.

"I don't think, in light of the total record -- but I want the transcript -- that it would in this case be prejudicial. You did not refer to it in the argument, and I did admonish the jury."

(RT 2148-2149)

The government's expert found a tax due and owing; the petitioner's expert found no tax liability.

On cross examination of government witnesses during the presentation of the government's case, defense counsel inquired as to defendant Nicoladze's reputation. (F.R.Evid. § 405.) The trial court permitted the question, even though presented "out of order" and the prosecutor was thus in a proper position to exercise his right

of cross examination of the character evidence.

The witnesses responded to the defendant's inquiry by asserting the defendant's excellent reputation. [E.g., government witness Doshier: "I'd say it was above -- if there is such a thing above excellent -- above excellent." (RT 874).] The prosecutor promptly cross-examined: "Would your opinion change if I suggested to you that on occasion Mr. Nicoladze lied under oath?" (RT 874). Prompt objection was made. The prosecutor's basis for the question was a deposition given by Nicoladze in a civil suit in Nevada in 1976. The deposition was admitted in evidence through witness Horton (RT 767-783). Whether Nicoladze had read it after transcription or had made any sworn acknowledgement to any attachment to it was not clear (RT 773-775, 780). Nor was the falsity of any statement made in the deposition clearly established.

REASONS FOR GRANTING THE WRIT

Grand Jury Misconduct: In effect, the grand jury was told that the IRS, the Justice Department and the United States Attorney believed

there was evidence beyond a reasonable doubt that defendant is quilty and that cases with less evidence will not be presented to a grand jury, due to the lengthy and careful review process. The grand jury had no opportunity to meaningfully evaluate any percipient witnes' veracity. It was not told of Nicoladze's contentions nor of the losses which would have raised substantive doubt as to any tax due and owing. Several witnesses at trial did not support the facts related by the IRS agent.

This court has pointed out on several occasions that one purpose of the requirement that an individual be indicted by a grand jury is to place between the prosecutor and the accused an independent body which can evaluate the evidence and determine if the charge is based upon reason. Wood v. Georgia, 370 U.S. 375, 390 (1962); Stirone v. United States, 361 U.S. 212, 218 (1960); Ex parte Bain, 121 U.S. 1 (1887). The accused has a right "to have the Grand Jury make the charge on its own judgment." Stirone v. United States, supra, at 219. "Neither by depriving the Grand Jury of its opportunity to evaluate the credibility

of witnesses, nor by making prejudicial remarks to sway the Grand Jury, may the prosecutor deny the accused this substantial right . . ." United States v. Gallo, 394 F.Supp. 310 (D.Conn. 1975).

To accept less than this as a right is unthinkable. Former Chief Judge Friendly of the Second Circuit Court of Appeals, said, with a hint of sarcasm: "When the framers of the Bill of Rights directed in the Fifth Amendment that 'no person shall be held to answer . . . unless on a presentment of an indictment of a Grand Jury', they were not engaging in a mere verbal exercise." United States v. Estepa, 471 F.2d 1132, 1136 (2d Cir. 1972).

There is no shield if the lay body of grand jurors is misled, misinstructed and misinformed by the accuser. There is no shield if the grand jury cannot hear evidence free from biased interpretation and argument, thereby corrupting its independence. "The very purpose of the requirement that a man be indicted by a Grand Jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." Stirone

v. United States, 361 U.S. 212, 218 (1960). As a right wrung from kings and deeded to us as our heritage, we should guard it well, and maintain its vitality with our vigilance. The proceedings before the grand jury that returned this indictment are a challenge to our dedication.

A restatement of these principles has been made in recent decisions.

Honorable William G. Last, Senior United States Judge for the District of Oregon, wrote for the Court in United States v. Samango, 607 F.2d 871 (9th Cir. 1979):

> Although deliberate introduction of perjured testimony is perhaps the most flagrant example of misconduct, other prosecutorial behavior, even if unintentional, can also cause improper influence and usurption of the grand jury's role.
>
> Samango at 882.

> The cumulative effect of the above errors and indiscretions, none of which alone might have been enough to tip the scales, operated to the defendants' prejudice by producing a biased grand jury.
>
> Samango at 884.

> Neither by depriving the grand jury of its opportunity to evaluate the credibility of witnesses nor by making prejudicial remarks to sway the grand jury may the prosecutor deny the accused this substantive right.
>
> (Citing, United States v. Gallo), Samango at 884.

Samango's roots lie in the oft-cited case of Costello v. United States, 305 U.S. 359 (1956), which calls for an unbiased and independent Grand Jury. The Samango Court construed this premise to mean a jury free from the prejudicial effect of prosecutorial misconduct. The court in Wood v. Georgia, 370 U.S. 375 (1962), expanded upon Costello and required that an independent and unbiased Grand Jury also must be an informed Grand Jury.

In June, 1979, the Ninth Circuit Court of Appeals addressed the subject of a testifying prosecutor and said:

> The chief fear which underlies the ethical rules, it is commonly acknowledged, is not that the testifying prosecutor actually will overreach a hapless defendant, but that he will appear to a skeptical public to have done so. The legal profession's disapprobation of the advocate-witness is thus closely related to the injunction in Canon 9 of the ABA Code of Professional Responsibility that "[a] lawyer should avoid even the appearance of professional impropriety." Particularly where the lawyer in question represents the prosecuting arm of the Government, the ethical rule serves to implement the maxim that "justice must satisfy the appearance of justice." This function of preserving public trust may be especially necessary in proceedings of the grand jury, which more than

a few critics have characterized as a mere tool of prosecutors.

United States v. Birdman, 602 F.2d 547 (9th Cir. 1979).

Sixty years ago Judge Augustus N. Hand, then sitting in the United States District Court for the Southern District of New York, faced a question in United States v. Rintelen, 235 F. 787 (1916), directly related to the one before this Court. Although he found no injury done by the prosecutor's dispassionate review of evidence coupled with a recital of applicable law, Judge Hand referred with approval to standards enunciated some time before:

> "The limit of the District Attorney's duties is reached when he has explained the maning of the laws, laid before you all evidence in his hands officially, and aided in the examination of the witnesses. He should take no part whatever in your discussion as to guilt. The weight and credibility of the testimony is wholly for you, without even a suggestion from him. His opinion as to the sufficiency of the evidence to prove guilt should never be given, even if asked by a jury. His opinion in reference to the meaning of the law should never be withheld. Whether the facts are proved, he has no right to suggest even. The purpose of these instructions was to secure a fair independent

investigation by the Grand Jury . . ." (Emphasis added.)

United States v. Rintelen, supra, 793.

Unequivocably, and contrary to the spirit and intent of those instructions, the prosecutor here made a finding of guilt, judged the credibility of the witness, and pronounced the case proved. To compound the error, the "witnesses" never appeared before the jury and their credibility was never scrutinized by the grand jurors.

Trial by Chart: The Sixth Amendment guarantees to the Petitioner a right to jury trial. That right includes a protection against usurption of the petit jury's functions by a "trial by chart".

> "The use of this type of evidence, however, has inherent danger to an accused, for a jury is often unfairly and unduly impressed by the apparent authenticity of a government witness' chart computations, as such, rather than by the truth and accuracy of the underlying facts and figures supporting them. A trial court is charged with grave responsibilities in such instance to insure that an accused is not unjustly convicted in a 'trial by charts,' however impressive the array produced. Ordinarily, it would be the better practice, not so carefully observed in this instance, to required that the source of the facts and figures upon which such a chart is based by fully disclosed before its admission into evidence. Whenever possible, such charts should be confined

> in their preparation to strictly mathematical computations, subject to detailed explanation upon the trial by the testimony of expert government witnesses, and they should not be encumbered by such impressive, conclusionary captions as 'Overstatement of Merchandise Purchases', 'Overstatement of Delivery Expenses', 'Unreported and Undeposited Cash Receipts Invested in United States Savings Bonds', 'Unreported Net Income of Mr. E. C. Lloyd', 'Income Tax Unreported and Unpaid by Mr. Lloyd', such as were used on the Government charts here in dispute. While a prosecution witness may testify as to such conclusions from his mathematical computations, we think the danger in permitting the unrestricted use of such phrases upon charts results from a jury's natural tendency to accept such unsworn, conclusionary verbiage as authentic, primary proof, instead of purely in summarization and explanation of sworn testimony or autenticated documentary evidence.
>
> Lloyd v. United States, 226 F.2d 9 (9th Cir. 1955); quoted in United States v. Abbas, 504 F.2d 123 (9th Cir. 1974)1/

Improper Impeachment: The decision of the Court of Appeal ignores this Court's decisions in Michaelson v. United States, 335 U.S. 469 (1948), and Bronston v. United States, 409 U.S. 352 (1973).

1/ United States v. Gardner, 611 F.2d 770, 776 (9th Cir. 1980), confirming the court's power to allow the use of charts, does not detract from Abbas' reasoning and caution.

Michaelson approved the principle that specific acts of misconduct of the Petitioner may be inquired of upon cross examination of Petitioner's character witnesses. The inquiry re misconduct, however, must be made in good faith and the prosecutor must be prepared to furnish the basis for such questions.

However, the government's basis for such inquiry was that the deposition testimony was inconsistent with statements made by the defendant to IRS agents during the tax investigation. This is not a good faith basis for propounding a question about "lying under oath" -- i.e., perjury. At the least, the good faith basis for propounding such a question should include evidence of the standard three elements of perjury. [See: Devitt and Blackmar, Federal Jury Practice and Instructions, § 33.03 (3d ed.).] The prosecutor had no such good faith basis and the trial court was seriously concerned with the government's conduct (RT 1551).

The record is devoid of any evidence to establish which, if any, of the two statements involved was untrue. The prosecutor assumed for his

own purpose that the deposition testimony under oath was untrue, but this was never established. The deposition testimony under oath could have been true and the later unsworn interview statement to the IRS agent untrue. OR the latter statement could have also been true in the context in which it was given. Neither the preciseness of the questions at deposition nor at the IRS inquiry were established.

In order for the prosecutor to properly propound a question re "lying under oath" (perjury), the statement at deposition must be known to meet the standards required for perjury set forth in this Court's decision in Bronston v. United States, 409 U.S. 352, 357 (1973). This was not done. The prosecutor chose the exact characterization -- lying under oath -- and must, under Berger v. United States, 295 U.S. 78, 88 (1935), be responsible for the impact.[2/] That there exist "criminally fraudulent" statements or "false impressions" is not sufficient. Cf. Bronston, supra, at 358, n. 4.

2/ As an officer of the court, the prosecutor -- an experienced Assistant U.S. Attorney -- should have followed the procedures mentioned in United States v. Lewis, 482 F.2d 632, 639 (D.C. Cir. 1973), and Gross v. United States, 394 F.2d 216 (8th Cir. 1968).

CONCLUSION

The Petition should be granted.

DATED: November 20, 1980

Respectfully submitted,

JERROLD M. LADAR

JERROLD M. LADAR
507 Polk Street
Suite 310
San Francisco, CA 94102

Counsel for Petitioner

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. GEORGE C. NICOLADZE, Defendant-Appellant.	)	No. 79-1740 D.C. No. CR79-0146-RFP M E M O R A N D U M

Submitted -- October 9, 1980

Appeal from the United States District court for the Northern District of California
Robert F. Peckham, District Judge, Presiding.

Before: KENNEDY, PREGERSON and POOLE, Circuit Judges.

Nicoladze appeals from his conviction of three counts of income tax evasion in violation of 26 U.S.C. § 7201.

His assignments of error concerning the government's presentation of the case to the grand jury, the government's attempted impeachment of character witnesses, the government's use of charts and summaries with allegedly improper headings, the government's alleged violation of his confrontational rights, the sufficiency of the evidence

APPENDIX A

of his guilt, and the propriety of the court's instructions are meritless.

The prosecutor's elaborate description of the process employed to decide whether to prosecute a tax case, although in response to a question asked by a grand juror inquiring into the reason for the delay in presenting the case to a grand jury, should as a matter of prudence and good judgment have been left unsaid. The error, however, did not meet the standard for prosecutorial misconduct set forth in United States v. Vargas-Rios, 607 F.2d 831 (9th Cir. 1979).

The evidence of Nicoladze's guild of the offense charged, if not overwhelming, was quite strong.

AFFIRMED.